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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

KAREN ANN DELCOURT,

Petitioner,

v.

DR. EDWARD SILVERMAN AND
NORMA LEVINE TRUSCH,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IN A CASE OF FIRST IMPRESSION INVOLVING A CHILD SEXUAL ABUSE, DID THE STATE OF TEXAS DENY KAREN DELCOURT AND HER CHILDREN SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE UNITED STATES CONSTITUTIONS FOURTEENTH AMENDMENT GUARANTEEING DUE PROCESS OF LAW AND VIOLATE THE FOURTH AMENDMENT PROHIBITING UNLAWFUL SEIZURES BY PERMITTING STATE APPOINTED OFFICIALS TO SEIZE AND SUBJECT SHE AND HER CHILDREN TO COMPELLED PSYCHOLOGICAL AND GUARDIAN EXAMINATIONS WITHOUT PROPER NOTICE, HEARING OR GOOD CAUSE?

II. IS DELCOURT'S RIGHT TO BE FREE FROM AND OBTAIN REMEDY FROM DEPRIVATIONS OF HER LIBERTY INTEREST AS SECURED BY THE UNITED STATES CONSTITUTION ABRIDGED BY GRANTING ABSOLUTE IMMUNITY, RATHER THAN QUALIFIED OR NO IMMUNITY, FOR PERSONS ACTING UNDER COLOR OF STATE LAW AND IN VIOLATION OF 42 U.S.C. SEC. 1983 AND OTHER TORT CLAIMS?

LIST OF PARTIES

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I. CITATION

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II. JURISDICTION

(I) Petitioner filed her application for writ of error on May 6, 1996 which was denied on August 1, 1996.

(ii) Petitioner filed her motion for rehearing with the Supreme Court of the State of Texas on August 19, 1996. The motion for rehearing was denied on September 19, 1996.

(iii) Petitioner is not aware of any cross petition at this time.

(iv) There are no 29.4 (b) or notifications indicated in this instance.

III. CONSTITUTIONAL PROVISIONS AND STATUTES

The following authorities are relevant to the determination of the present case:

UNITED STATES CONSTITUTION, AMEND IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMEND.XIV,SEC.1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 UNITED STATES CODE SEC. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TEXAS CONSTITUTION, ARTICLE I, SECTION 19:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the law of the land.

TEXAS RULE OF CIVIL PROCEDURE 167a(a), PHYSICAL AND MENTAL EXAMINATION OF

PERSONS:

Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph (d) of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify.

TEXAS RULE OF CIVIL PROCEDURE 167a(d), CASES ARISING UNDER TITLE II, FAMILY CODE:

In cases arising Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint: (1) one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify. (2) non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

TEXAS FAMILY CODE 11.10, NOW TEXAS FAMILY CODE SEC. 107.001:

(a) In a suit in which termination of the parent-child relationship is requested, the court or an associate judge shall appoint a guardian ad litem to represent the interests of the child immediately after the filing of the petition but before the full adversary hearing to ensure adequate representation of the child, unless:

(1) the child is the Petitioner;

(2) an "attorney ad litem" has been appointed for the child; or

(3) the court or an associate judge finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.

IV. SUMMARY OF ARGUMENT

Petitioner inquires of the United States Supreme Court, *on a case of first impression in Texas involving a child sexual abuse*, whether a psychologist and a guardian ad litem appointed by an associate judge in temporary orders not confirmed by the trial court and rendered null and void by the presiding judge, are properly entitled to absolute immunity pursuant to the theory of derived-judicial immunity despite misconduct in the performance of their duties, and in violation of Petitioner's and her children's right to due process under the United States Constitution? This question is asked in the context of an abridgment of substantive and procedural due process rights of a mother and her children, who were subjected to compelled mental examinations by Respondents who reevaluated issues that were "res judicata", to the extent that Petitioner and all persons similarly situated, are denied all pre-and post-deprivation remedies of any kind in deference to a State sanctioned expansion of judicial immunity.

V. STATEMENT OF FACTS

Petitioner, Karen DelCourt (DelCourt), and her former husband, Tony Moreland (Moreland), were divorced by agreement in May 1988. DelCourt and Moreland agreed to a custodial arrangement with Moreland as managing conservator with DelCourt having joint visitation of their minor child Tiffany, age 3 (Appendix II (App.II) 4; Vol.I Tr. 59). After returning from staying with her father in March 1989, Tiffany said in the presence of several witnesses that "her private place hurt". When asked if someone had hurt her, the child identified her stepbrother (who lived with Moreland) as the perpretrator (App.II, 115-119; Vol.II Tr. 366-68, 372). The mother was referred by the Houston Police to Hermann Hospital Emergency Room in Houston where corroborating evidence of molestation were found (App.II, 115-119; Vol.II Tr. 366-68, 372-74). Texas child protective services and sheriff's authorities were notified. (App.II, 117-118; Vol.II 368, 372).

DelCourt immediately moved for emergency orders requesting to be appointed sole managing conservator of Tiffany (App.II, 120-124; Vol.II Tr. 386-390). Tiffany's sister, Kori, age 10, who resided with DelCourt, was maliciously implicated in her sister's sexual abuse by Moreland and his wife, and was consequently involved in the case in spite of Tiffany being in Moreland's possession at the time she was molested. A trial was held and the court entered the jury's verdict on December 20, 1989 finding that Moreland should be removed as the managing conservator and that DelCourt should be awarded sole conservatorship of the child based on the evidence of the child's sexual abuse (App.II, 14, 16, 32; Vol.I, Tr. 75, 77, 93). Moreland filed a motion for new trial which was

denied. (App.II, 34; Vol.I, Tr. 95).

Concerned about the trauma to both of her children of the molestation, and on advice from the City of Houston Mental Health Department and Texas Children's Hospital, DelCourt was referred to and spoke with a criminal district judge who was on the panel for a child sexual abuse recovery forum. He informed her that mandatory to receiving victim's benefits she would have to write the sheriff's department regarding the lack of criminal investigation (App.II, 74; Vol.II Tr. 288). The criminal case was reopened and Moreland filed a motion to change custody alleging that DelCourt was making allegations of sexual abuse and that the reopening of the criminal investigation was causing Tiffany emotional distress. This ploy was used to successfully to stop the criminal investigation before it began.

A temporary hearing to change custody of the child was scheduled but DelCourt was never served with notice of the hearing (App.II, 81-82; Vol.II Tr. 403-404), and was viewed as having defaulted (App.II, 35; Vol.I, Tr. 99) by the associate judge. The process server served a third party "the day before" the hearing who had no association with the proceedings. The associate judge, Linda Motheral, conducted an *"ex parte"* hearing removing DelCourt as managing conservator of Tiffany which had just recently been awarded by the jury three (3) months earlier. Motheral's ruling designated Moreland as managing conservator under Texas Family Code §14.08(d) and §14.08(g) pursuant to Texas Family Code §11.11 which states that there must exist an emergency situation for temporary orders to be entered changing custody within a year after being litigated. Without the benefit of the mother's presence, the ruling provided as follows:

> [f]or the safety and welfare of the child, Dr. Edward Silverman is appointed to evaluate the child and parties. . . Writ of attachment to issue to pick up child & deliver her to Family Court Services, 1115 Congress, Houston, Texas 77002, during business hours, 8 am to 5 pm Mon.- Fri., to Harris County Juvenile Probation Dept. . .any orders pertaining to Moreland's obligation to pay child support shall cease.. (App.II, 35 & 36; Vol.I Tr. 99 & 100).

When subsequently apprised of Motheral's ruling, and consistent with the rules of court, Texas Government Code §54.011 and §54.013, now Texas Family Code 201.011, et seq., DelCourt immediately moved within the prescribed three (3) days following Motheral's ruling to set aside the temporary orders changing custody and ordering mental examinations (App.II, 81-82; Vol.II Tr. 403-404). The presiding judge signed the appeal resetting the issue for hearing (App.II, 144; Vol.II Tr. 406), and DelCourt retained custody of Tiffany (App.II, 146, Vol.II,Tr. 348). Trusch claims she was appointed by Motheral the same day the temporary orders were set aside by the presiding judge. She further admits to an *"ex parte"* conversation held with Motheral outside the courthouse wherein she was requested to serve as guardian ad litem two (2) weeks after DelCourt won custody of Tiffany and two (2) months before being appointed (App.II, 149; Vol.I, Tr.101). Trusch informed DelCourt the day she was appointed that Tiffany was never molested even though "dried blood" had been found in the child's vagina.

Despite DelCourt's appeal and thus nullification of the court's temporary orders pending notice and hearing, Silverman and Trusch proceeded to act upon

the void orders and subject the parties and child to mental examinations and evaluations under vehement protest by DelCourt (App.II, 54, 55, 75; Vol.II Tr. 267, 268, 289). Trusch admits in her Response to DelCourt's motion for rehearing on writ of error that "she was responsible for recommending the evaluations" constituting a judicial admission confirming DelCourt's claims (App.II, 143 (P/E No. 43).

Silverman and Trusch threatened DelCourt that if she did not "cooperate", she faced loss of her child, Tiffany, with negative reports. Under such duress and coercion, DelCourt surrendered herself and her child under protest, to Respondents for mental and guardianship examinations conducted by each designated state actor, who then, reevaluated the identical issues of the sexual abuse that were *res judicata* from the 1989 trial (App.II, 55, 75; Vol.II Tr. 268, 289). Tiffany was evaluated on eight separate occasions. Kori was also subjected against DelCourt's and Kori's consent to compelled mental examinations and Kori was not a party to the case. During one of the many unauthorized and compelled examinations, Respondents forced Tiffany to be present with the alleged perpetrator (who was not a party to the case) without her mother's knowledge and/or consent and then denied Kori and Tiffany sessions together. This was discovered during the October 1990 trial.

The jury trial was preferentially set by Trusch as "attorney ad litem" when no emergency existed and there was no material change in circumstances. Trusch represented herself at all times as the attorney ad litem rather than as guardian ad litem and admits to participating in the trial as attorney ad litem in her motions for summary judgment and evidenced by her

signing both the trial setting (App.II, 147; Vol.II,Tr. 352,353) and the Order on the Motion for Modify as the attorney ad litem[1] (App.II, 37, 47; Vol.I,Tr. 108, 118). Silverman and Trusch relied on their unlawfully gathered information collected from reevaluating issues that were *res judicata* and used their own arbitrary and compelled mental examinations and resulting fraudulent reports as evidence to recommend that DelCourt be removed as managing conservator.

Acting pro se, DelCourt filed suit against Silverman and Trusch asserting that both had acted in bad faith, without authority, and maliciously against DelCourt and her children. DelCourt further asserted claims of fraud, civil conspiracy, common and gross negligence, intentional infliction of emotional distress, deprivation of parental rights (App.II, 55, 60, 62; Vol. II Tr. 268, 273, 276), denial of constitutional rights to due process (App.II, 64; Vol.II Tr. 278), and a claim sounding in constitutional deprivation, 42 U.S. C. Sec. 1983, though not explicitly denominated as such in her petition (App.II, 64; Vol.II Tr. 278). In all her pleadings, DelCourt complained that Respondents forced her and her children against their will into evaluations not court ordered and took actions involving her children without her knowledge and/or consent.

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[1] Trusch's appointment as guardian ad litem contemplated she act as an extension or arm of the court and that she did not depart from the scope of the appointment. By actively participating in the trial as attorney ad litem, thus, by advocating, Trusch abandoned her impartial role as an extension or arm of the court which cannot act as an advocate. *DelCourt v. Silverman, et al* at 786.

Respondents filed a motion for summary judgment claiming they were entitled to absolute immunity under the theory of derived judicial immunity. DelCourt filed a response contesting on the grounds that material fact issues existed on the breach of court appointments, breach of common law duty, intentional infliction of mental anguish, negligence, fraud, conspiracy and violation of constitutional rights (App.II, 70-76; Vol.II Tr. 284-290). Trusch filed an amended motion for summary judgment [disguised as a response (Supp.Tr.001)], attaching a new affidavit signed by Motheral the day before summary judgment that was served on DelCourt the next day *during* the hearing on summary judgment. Motheral made the fraudulent representation that "Moreland was granted custody of Tiffany in temporary orders" (App.II, 151; Supp.Tr. 027) that was used by both counsel of record to negate DelCourt's constitutional claims. Counsel fraudulently stated to the trial court that DelCourt did not have custody during the time in question and could not claim any constitutional violations.

DelCourt filed a supplemental petition objecting the fraudulent representation before summary judgment was rendered (App.II, 77, Tr. 291), and filed a motion for rehearing and/or new trial after summary judgment was granted protesting the fraudulent representation and, *inter alia*, violation of her constitutional rights to due process (App.II, 83-114; Vol.II Tr. 300-339) specifically raising the fact issue of the pleading of her 42 U.S.C. Sec. 1983 claim (App.II, 92; Vol.II Tr. 309). Trusch's counsel stated on record at the April 27, 1994, hearing on the motion for rehearing and/or new trial that the temporary orders recommended by Motheral *were set aside* (App.II,145; SF10) after representing to the trial court otherwise, thereby validating DelCourt's claims.

The 14th Court of Appeals affirmed the grant of summary judgment on the grounds of derived judicial immunity refusing to consider DelCourt's argument that immunity should not attach, holding that DelCourt did not raise any constitutional claims despite Point of Error Two addressing "Motheral's fraudulent affidavit" being improperly served and used as summary judgment evidence to directly negate DelCourt's constitutional claims (App.II-126-127). The Appeals Court ruled this point was "meritless" and "immaterial", *DelCourt v. Silverman* at 781 (App.I, 5) and used a legal article "written by Motheral to support their opinion". *Id.* at 783-784, Ft.1; 785-last para., App.I-12-13; 18). The Texas Supreme Court denied DelCourt's application for writ of error (App.II, 2, 129-134) and motion for rehearing when many of the forty-four (44) points of error in the motion for rehearing included numerous violations of law and fraud committed before the Texas Supreme Court by both Respondents' counsel of record (App.II-1, 135-143).

ARGUMENT

I. IN A CASE OF FIRST IMPRESSION INVOLVING A CHILD SEXUAL ABUSE, DID THE STATE OF TEXAS DENY KAREN DELCOURT AND HER CHILDREN SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE UNITED STATES CONSTITUTION'S FOURTEENTH AMENDMENT GUARANTEEING DUE PROCESS OF LAW AND VIOLATE THE FOURTH AMENDMENT PROHIBITING UNLAWFUL SEIZURES BY PERMITTING STATE APPOINTED OFFICIALS TO SEIZE AND SUBJECT SHE AND HER CHILDREN TO COMPELLED PSYCHOLOGICAL AND GUARDIAN EXAMINATIONS WITHOUT

PROPER NOTICE, HEARING OR GOOD CAUSE?

DelCourt was coerced under threat of loss of custody of her child to submit herself and her children to compelled mental and guardianship examinations. It is elementary that there is a denial of due process when a person is committed, or, as here, held without a hearing and opportunity to be heard. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 257, 92 S.Ct. 2083, 2091, 32 L.Ed.2d 719 (1972). It is also well established that surrender to the State's show of authority constitutes a seizure for purposes of the Fourth Amendment[2]. *Albright v. Oliver,* 510 S.Ct. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1993), citing *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968).

A. THE STATE ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE COMPELLED MENTAL AND GUARDIANSHIP EXAMINATIONS WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATES DUE PROCESS AND THE RIGHT TO BE FREE FROM UNLAWFUL SEIZURE.

DelCourt was never served with notice of the hearing that was held on March 22, 1990, in the 257th Judicial District Court of Harris County, Texas (App.II, 35; Vol.I, Tr. 99). The Master's Report signed by the associate judge, on March 22, 1990, was timely appealed by DelCourt on March 23, 1990 objecting to

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[2] The Fourth Amendment applies to the states under the due process clause of the Fourth Amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961).

the temporary orders issued by the associate judge in accordance with the Texas Government Code §54.011. Further, the temporary orders granting DelCourt's ex-husband temporary custody were never confirmed as an order of the court pursuant to the Government Code §54.013 and no writ of attachment issued supporting the grounds for attachment. DelCourt retained custody and continued to receive child support (App.II, 146, Vol.II, Tr. 348). Nevertheless, beginning March 26, 1990, without notice and hearing and without any court orders in conformity with Tex.R.Civ.P. §167a, both Respondents coerced DelCourt into evaluations along with both of her minor children by threatening DelCourt with loss of her children under the guise of their court appointed authority. The U.S. Supreme Court has recognized that "freedom of personal choice in matters of...family life is one of the liberties protected by the due process clause of the Fourteenth Amendment". *Smith v. Offer*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). Freedom from unlawful seizure is likewise protected under the Fourth Amendment. *Albright*, 510 U.S. at 266, 114 S.Ct. at 807. Respondents subjected the minor child, Tiffany, to eight (8) separate evaluations, one with the perpetrator of the sexual abuse, without DelCourt's consent and/or knowledge, and re-evaluated the identical issues of the sexual abuse that were *res judicata* from the December 1989 trial.

There is no reason to assume that family relationships are any less deserving of constitutional protection than those provided to criminals. Indeed, because of a child's unique vulnerability and the momentousness of the parent-child relationship, such relationships may be viewed as more significant since some parents would rather subject themselves to criminal imprisonment than to have their children

mistreated. Respondents' actions denying DelCourt's parental rights and her children's right not to be examined against their mother's consent violates fundamental liberties protected under Article I, Section 19 of the Texas Constitution and the Fourteenth Amendment of United States Constitution. *In the Interest of J.W.T., a Minor*, 872 S.W.2d 189, 191 (Tex. 1994). Children are no less citizens of this country, and no less entitled to protection from unconstitutional seizure and state intrusion on physical and mental integrity. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

DelCourt was entitled to be informed of Respondents' intended examinations involving her minor children beforehand, and was entitled to make the choice, without the presence of coercion and threat, of whether or not to subject her children to examinations and with whom. "There are many instances where matters involving family and relationships within the family have been deemed to involve due process rights. Due process requires procedural protection of a parent's interest in the care, companionship and custody of their children...". *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). That interest is rendered of no consequence under the force of state action and coercion.

One federal court has recognized that the preservation of family integrity encompasses the reciprocal rights of both parents and children. *Duchense v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). DelCourt was denied her legal right to notice and hearing in order to challenge these evaluations. When she complained to Respondents, DelCourt was threatened with an unfavorable report. Compelled mental

examinations are intrusions of such import, that post-deprivation due process will not remedy the damage. Pre-deprivation due process protections must exist and be enforced.

B. COERCED SURRENDER FOR COMPELLED MENTAL EXAMINATIONS OF MOTHER AND CHILDREN BY COURT APPOINTED OFFICIALS IS A SEIZURE SUBJECT TO CONSTITUTIONAL PROTECTIONS

Surrender to the State's show of authority constitutes a seizure for purposes of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Respondents claim that they should be cloaked with judicial immunity for actions taken in accordance with court orders because they were acting as an arm of the court. Respondents, as state actors, violated DelCourt's rights by actions taken in violation of the Texas Rules of Court §167a which state:

> "When the mental or physical condition .....
> of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a psychiatrist or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause show and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made....".

The Texas court of appeals stated that though no written orders were presented by Silverman or Trusch showing they were appointed, both included their own affidavits and an affidavit from Linda Motheral stating they were appointed. Meaningful notice and an opportunity to be heard prior to compelled mental examinations is not satisfied by "after-the-fact self-serving affidavits" by government officials. If so, all state constitutional deprivations would simply be expunged by post hoc paper work. That gesture in futility falls far short of protecting the civil liberties of citizens. Given that the associate judge's written order was void, a verbal appointment, standing alone, fails to provide adequate notice of the acceptable parameters of a seizure and compelled examination.

A verbal order fails to justify a state intrusion of this magnitude. DelCourt was in no position to comprehend what "good cause" existed that must necessarily exist in an "ex parte" compelled mental and guardianship examination proceeding. Verbal orders also fail to provide the parent with reasonable notice of the requisite parameters of the appointees grant of authority. As state actors functioning as an arm of the court, DelCourt and her children were entitled to ***written*** notice that (1) showed on its face the authority on which the court appointed officials acted, (2) the good or probable cause justifying the state intrusion, and (3) the time, place, manner, conditions and scope of the examination and the person or person by whom it is to be made. If Karen DelCourt or her children were criminals, the state court would have afforded the mother and children more protection than they received in this instance.

C. PROCEDURAL AND SUBSTANTIVE DUE

PROCESS WAS VIOLATED BY THE UNLAWFUL SEIZURE (COMPELLED SURRENDER) AND LACK OF NOTICE AND AN OPPORTUNITY TO BE HEARD.

The due process clause prohibits the State from depriving individuals of life, liberty, or property without "due process of law". In cases arising under Title II of the Texas Family Code, the Texas Rules of Civil Procedure 167a mandates that an order for examination may be made only on the court's own motion or on the motion of a party for good cause shown and upon notice to the person or persons to be examined and shall specify the time, place, manner, conditions, and scope of the examination.

DelCourt and her children were forced into psychological and guardianship examinations by Respondents and denied their rights to due process. The times, place, manner, conditions and scope of the examination were never delineated by the court, but left to the sole discretion of the court appointed professionals who now may cloak themselves with absolute immunity.

DelCourt had the right to notice and opportunity to be heard at a meaningful time and in meaningful manner under the due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances. *Mathews*, 424 U.S. at 334. In this case where the deprivation is significant--compelled mental examination of self and children and subjection to loss of custody--significant protections must exist, *and be followed.*

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)(good cause not shown for compulsory mental examination).

Texas Rule of Civil Procedure 21 requires three (3) days notice of a hearing on a motion and under T.R.Civ.P. 167a requiring notice and hearing on any mental examination. DelCourt requested a rehearing which was granted, but never held. She was forced to subject herself and her children to compelled mental examinations under threat of loss of her children by the court appointed professionals. With sporadic legal assistance, the mother was trapped in a system that threatened loss of her children if she did not comply, but itself, failed to provide objective justification for the intrusion inflicted.

1. MOTHER DID NOT RECEIVE NOTICE OF HEARING AND OPPORTUNITY TO CHALLENGE

The 14th Court of Appeals erred in its rendition of the factual background of its opinion in *DelCourt v. Silverman et al*, 919 S.W.2d at 777 (Houston-14th Dist.) 1996, in spite of DelCourt's pleadings (App.II, 54, 70, 77, 83; Vol.II, Tr. 267; 284; 291, 300), evidence (App.II, 81, 146; Vol.II, Tr. 348 & 403) and oral argument before the court to the contrary by stating that "DelCourt, though served with notice, did not appear at the hearing". *Id.* at 279. DelCourt was never served with notice of the hearing that was held on March 22, 1990. According to the Master's Ruling (App.II, 35; Vol.I, Tr. 99), DelCourt was served with notice on March 21, 1990 pursuant to Tex.R.Civ.P. §103 and §106. The process server in this case did not serve DelCourt but attempted service on a third party in her car in a parking lot who had no

knowledge of what was transpiring. This failure of service was brought to the attention of the district court who granted DelCourt's appeal of the temporary orders by setting a rehearing date of April 11, 1990 (App.II, 144; Vol.II, Tr. 406).

DelCourt would show that the date of service stated in the Master's Ruling was March 21, 1990, and the hearing was scheduled and held on March 22, 1990, therefore, DelCourt would have not had three days notice in conformity with Tex.R.Civ.Proc. §21 which states:

> "An application to the court for an order and notice of hearing thereon...shall be served upon all other parties not less than three (3) days before the time specified for the hearing. . ."

On March 23, 1990, DelCourt filed her Notice of Appeal of the Master's Ruling (App.II. 81-82; Tr. 403) complaining that she was not served with notice of the hearing and requesting a rehearing. On March 26, 1990, the trial court judge signed the Order Setting Hearing resetting the hearing for April 11, 1990. (App.II. 144; Vol.II, Tr. 406). Respondent Trusch admits in her Response to DelCourt's Motion for Rehearing on Writ of Error that the hearing scheduled for April 11, 1990 was never held.

Trusch, on March 26, 1990, represented to DelCourt that she was the "attorney ad litem" for the minor child and informed DelCourt that she wanted DelCourt to call Silverman and schedule appointments for both DelCourt and Tiffany to be evaluated. Said hearing scheduled for April 11, 1990, was canceled by Trusch after Trusch represented to DelCourt that she should "trust her" and there would not be a problem if

she cooperated. Respondents were acting under color of law, without valid orders, without specific guidelines, and acting in a manner that was coercive and destructive to the parental relationship.

2. THE IMPROPERLY GATHERED INFORMATION AND EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The constitutional violation that occurred in this case should not be relegated to a post-deprivation hearing. The seizure, intrusion and damage is already significant. The coercion is accomplished. A remedy which has served to deter coercion by state officials is suppression of the illegally obtained evidence. DelCourt requests similar considerations when constitutional due process rights have been violated. Information and evidence gleaned from improper state actor intrusion should be disallowed in a subsequent proceeding. Barring that remedy, the victims of improper and excessive state action must be provided with an opportunity to vindicate the wrong done.

a. Associate Family Court Judges have limited powers.

The Texas Government Code §54.007, now Texas Family Code 201.007 specifically states that associate judges "cannot render but may only recommend" that orders be entered. Respondents claim their appointments were ordered by the associate judge, however, the associate judge may only *recommend orders be entered.* Respondents claim that Motheral ordered both their appointments to investigate and evaluate allegations of sexual abuse being made by DelCourt. Respondents and Motheral were aware of the

fact that DelCourt was not making allegations of sexual abuse but only had the criminal investigation reopened. Texas Government Code 54.013, now Texas Family Code 201.013 provides:

> "(b) If an appeal to the referring court is not filed or the right to an appeal to the referring court is waived, the findings and recommendations of the associate judge become the order of the referring court only on the referring court's signing an order conforming to the associate judge's report".

DelCourt did appeal the order in question, and the district judge never adopted the associate judge's recommendations "evidenced" by his not signing the Master's Report (App.II, 35, Vol. I, Tr. 99). Nonetheless, Silverman and Trusch continued to exert the full force of their void appointments, and acting on alleged state authority, threatened DelCourt with loss of her children if she did not comply with their demands. Neither Respondents have any valid court orders appointing them in the capacity that they operated since the trial court did not confirm either of their appointments.

b. Their actions are subject to appeal to the district court judge.

According to the Texas Government Code §54.013, now Texas Family Code 201.013, the findings and recommendations of the associate judge become the decree or order of the referring court only on the referring court's signing an order or decree conforming to the associate judge's recommendations. Pursuant to Government Code §54.011, now Texas Family Code 201.015, a party has three (3) days in which to appeal an associate judge's ruling.

c. The temporary orders were appealed thus nullifying the orders and rendering it moot.

Based on DelCourt's timely appeal filed the day after the Associate Judge's ruling (App.II, 81, Vol. II, Tr. 403), the temporary orders were null and void. Furthermore, the trial court judge signed DelCourt's notice of hearing (App.II, 144; Vol.II, Tr. 406) which is on file with the Harris County Courthouse as an Order Setting Hearing rescheduling the hearing to April 11, 1990.

d. No valid order existed supporting or defining the parameters of the court appointed psychologist and guardian ad litem's authority.

The temporary orders made in the Associate Judge's report recommended that Silverman evaluate Tiffany and the "parties" to the action. Who were "parties" was never defined, but Respondents subjected DelCourt's other child, Kori, and herself to compelled examination. The temporary orders were null and void by the timely filing of DelCourt's Notice of Appeal and by the trial court judge signing the Order Setting Hearing. No court orders were ever rendered ordering DelCourt and/or her children, Tiffany and/or Kori, into mental examinations. Furthermore, Kori was not a party to the case. Silverman and Trusch had no valid court orders allowing either of them to evaluate DelCourt and her children in accordance with and in violation of Tex.R.Civ. P. 167a or to act in their purported capacities as state officials appointed to assist the court. The issue of custody was litigated in the prior modification, and the findings should have been *res judicata* as there was no evidence of changed circumstances. The United States

Constitution provides protection for formal family relationships:

> The institution of marriage has played a critical role both in defining the legal entitlement of family members and in developing the decentralized structure of our democratic society. . . . In some case, however this Court has held that the Federal Constitution supersedes state law and provides greater protection for formal family relationships. . . . [T]he court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection. See also *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

State intervention to terminate such a relationship must be accomplished by procedures meeting the prerequisites of the Due Process Clause. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599(1982). *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

3. THERE ARE INSUFFICIENT PROCEDURAL AND SUBSTANTIVE PROTECTIONS AVAILABLE TO PREVENT ARBITRARY STATE ACTION

A procedural due process analysis is two-tiered. The reviewing court must determine whether a protected liberty or property interest exists and, if so, decide whether sufficient procedural safeguards are employed to assure the deprivation of that interest is not arbitrary. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Hewitt v. Helms*, 459 U.S. 460, 103

S.Ct. 864, 74 L.Ed.2d 675 (1983).

In this instance, DelCourt and her children possess well established liberty interests, arising by virtue of the fundamental interest in the family relationship, as well as by statute (Tex. R. C. P. 167a) since it placed "substantive limitations on official discretion" to deny a particular interest. *Kentucky Dept. Of Corrections v. Thompson*, 490 U.S. 454, 462, 109 S.Ct. 1904, 1909, 104 L.Ed.2d 506, 516. In this instance, the court could only appoint a psychologist upon a showing of good cause, and with detailed limitations concerning the extent of the examination. Respondent Silverman was entitled to perform only an "appropriate" examination.

DelCourt and her children were never provided with a meaningful opportunity to stop the compelled examinations or restrain the scope and manner of examinations. Respondents involved the perpetrator of the sexual abuse without any notice to DelCourt that they intended to subject Tiffany to a session with the perpetrator who was neither court ordered to be evaluated nor was he a party to the case.

DelCourt, as managing conservator, had the exclusive right to have been consulted and consent to any evaluation and/or treatment involving Tiffany and/or Kori unless an emergency existed justifying the compelled mental examinations. No such emergency was ever shown. Respondent Trusch filed an answer as "guardian ad litem" for Tiffany on May 8, 1990, entering a general denial after having evaluated Tiffany on 3-4 occasions. Four weeks later, Trusch filed a Motion for Preferential Trial Setting as the self-appointed "attorney ad litem" (App. II, 147; Vol.II, Tr. 352) claiming that any

"undue delay would cause Tiffany further psychological damage and emotional stress" when Respondents alone were responsible for subjecting Tiffany to four (4) or five (5) additional examinations, one with and including the perpetrator. The minor child, Kori, was forced into an evaluation even though the child objected and complained that she did not want to be involved, and then, denied her right to a session with her sister.

II. IS DELCOURT'S RIGHT TO BE FREE FROM AND OBTAIN REMEDY FROM DEPRIVATIONS OF HER LIBERTY INTEREST AS SECURED BY THE UNITED STATES CONSTITUTION ABRIDGED BY GRANTING ABSOLUTE IMMUNITY, RATHER THAN QUALIFIED OR NO IMMUNITY, FOR PERSONS ACTING UNDER COLOR OF STATE LAW AND IN VIOLATION OF 42 U.S.C. SEC. 1983 AND OTHER TORT CLAIMS?

This Court explained in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 393 (1984) in the ordinary case where an injury has been caused not by state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under section 1983, at least in a suit based on the due process clause of the Fourteenth Amendment. Texas is unwilling to provide a remedy for the wrong alleged in this case because the state court awarded Respondents absolute immunity. DelCourt challenges the grant of absolute immunity, and if enforced, requests that the Court recognize her 42 U.S.C. section 1983 claim and related claims.

A. RESPONDENTS SHOULD NOT HAVE BEEN GRANTED ABSOLUTE IMMUNITY

The grant of absolute judicial immunity does not exist in an existential vacuum. Judges must still abide by state and/or federal codes of conduct specifically designed to prevent an abuse of authority. No similar protections exist in the case of professionals appointed in their capacities as psychologists and/or attorneys. In those cases, the codes do not approach the professional as a judicial officer because the thrust of the guidelines is with the professional role, not with an abuse of power and authority.

Judges are subject to judicial peer oversight. Court appointed professionals are not. There is no body of individuals designed to oversee court appointed officials. Unlike court appointed professionals, judicial clerks and other support staff face termination. Court appointed professionals do not since they are independent contractors. They are free to go down the hall to the next courtroom. Judges cannot.

Judges are paid by the governmental unit which acts to distance them from the parties in dispute, and thus lessen the possibility of a party attempting to purchase a favorable decision. Not so with court appointed professionals. Such persons are ordered to be paid by the parties as in this case. Where one party has more financial independence than the other, as was the case in this instance (to DelCourt's disfavor), there is a palpable ground for lack of candid objectivity when the professional is being paid by the subject of the evaluation. Hence, the threat of monetary loss does not operate to confine the conduct of the state actors. In reality, the state court's decision has given court appointed professionals more freedom and protection than judges enjoy.

In a like manner, police officers who may be required to seize or intrude upon citizens must act under carefully prescribed procedures. For example, in *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), this Court observed that a prosecutor's administrative duties and investigatory functions that do not relate to the advocate's preparation for initiation of prosecution or for judicial proceedings are entitled to only qualified, and not absolute immunity. The fact that the prosecutors in *Buckley* later called a grand jury to consider the allegedly falsely obtained evidence did not retroactively transform that work from administrative into prosecutorial work merely by invoking a judicial proceeding. Similarly, the subsequent custody trial that was held in the custody case, in which the tainted investigations and evidence were used against DelCourt and her children, did not retroactively transform the court appointed officials investigation from administrative to judicial arms of the court.

In the criminal law arena, probable cause for a warrant must exist unless emergency circumstances exist. Police officers are entitled to only qualified immunity in the context of a constitutional deprivation. *Johnson v. Jones*, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Are parents entitled to less protection? Are their children? The court of appeals opinion appears to answer this question in the affirmative.

Respondents were acting more like investigators than judicial officers. It was their role to examine the parties, gather data, observe and investigate the parties concerning their investigation of DelCourt's allegations of sexual abuse. Since DelCourt was not making allegations of sexual abuse but had original criminal investigation reopened, Respondents reevaluated the

original allegations instead and involved the idential parties. It was not their role to make adjudicative decisions.

Even if some grant of immunity may be in order to protect the public interest in having objective professionals to assist family courts, that immunity should be qualified at best and carefully circumscribed to prevent an abuse of power. Procedural and substantive guidelines should be carefully followed when compelled mental examinations are ordered. This is particularly the case where citizens are being coerced into compelled mental examinations and face the loss of their child and the destruction of their family life.

This court has defined the scope of the liberty interests under the Fourteenth Amendment, and such interests should not be undermined by expansive grants of absolute immunity to unaccountable appointees:

> [The liberty interest] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, ***establish a home and bring up children***, to worship God according to the dictates of one's own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness to free men. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1970)(emphasis added).

B. DELCOURT PLED A VALID SECTION 1983 AND CONSTITUTIONAL VIOLATION

WARRANTING A TRIAL ON THE MERITS.

> 42 United States Code sec. 1983 provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

DelCourt's third amended petition and supplemental pleading (App.II, 54, 77; Vol.II, Tr. 267, 291) outlined the facts and properly alleged violations of her constitutional rights and various state tort claims. (App.II, 64; Vol.II, Tr. 278). DelCourt's response to motions for summary judgment and Motion for Rehearing/New Trial raised the issue of violations of constitutional rights to due process, specifically raising the issue of her section 1983 claim, (App.II, 70, 74, 83, 92, 96; Vol.II, Tr. 284, 288, 300, 309, 313), and challenging the claim to absolute immunity to all claims.

C. COURT APPOINTED STATE ACTORS SHOULD BE SUBJECT TO 42 U.S.C. SEC. 1983 AND TORT CLAIMS.

The initial inquiry in section 1983 claims is (1) whether the conduct complained of was committed by a person acting under color of state law, and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). There can be no question that Silverman and Trusch were acting under color of state law since that was the thrust of their

affirmative defense. They argued that as state actors performing functions "as an arm of the court", they are entitled to absolute immunity.

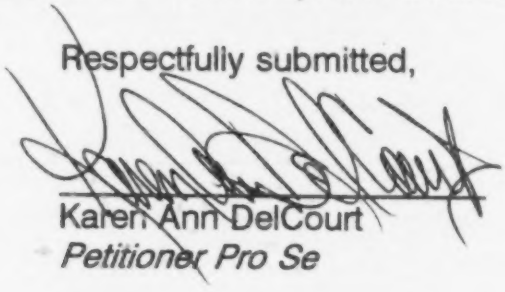
There is similarly little question that Respondents' conduct deprived DelCourt and her two daughters of their rights, privileges or immunities secured by the Constitution or laws of the United States since all were forced to surrender themselves against their will for compelled mental examinations, and subject themselves to potential self-incrimination and loss of their family existence if defied.

Absolute immunity for constitutional and tort claims should not be expanded to include court-appointed professionals who lack the requisite accountability for misconduct, and who act outside discernible guidelines. This is particularly the case where bad faith has been alleged and not contested as in this case.

CONCLUSION

For all of the aforementioned reasons, DelCourt respectfully requests that the United States Supreme Court reverse the decision of the Texas Supreme Court.

Respectfully submitted,



Karen Ann DelCourt
Petitioner Pro Se

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

KAREN ANN DELCOURT,

Petitioner,

v.

DR. EDWARD SILVERMAN AND
NORMA LEVINE TRUSCH,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Texas

APPENDIX I

KAREN ANN DELCOURT
P.O. BOX 417
CYPRESS, TEXAS 77429
713-373-9393

PETITIONER PRO SE

Affirmed and Opinion filed March 7, 1996.

In the
Fourteenth Court of Appeals

No. 14-94-00579-CV

KAREN ANN DELCOURT, Appellant

V.

DR. EDWARD SILVERMAN, PH.D. AND NORMA LEVINE TRUSCH, Appellees

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Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 92-44280

O P I N I O N

Karen Ann Delcourt, appellant, appeals from summary judgments in favor of Dr. Edward Silverman, Ph.D., and Norma Levine Trusch, appellees, in a suit arising out of a child custody dispute. DelCourt brings nine points of error alleging the trial court erred in granting the summary judgments. We affirm.

I. Factual Background

On May 17, 1988, DelCourt and Tony Moreland were divorced. Moreland was named managing conservator of the couple's minor child, Tiffany, Delcourt was granted visitation. On February

17, 1989, Moreland filed a motion to modify asking the court to restrict DelCourt's access to Tiffany. Delcourt filed a motion asking to be appointed sole managing conservator. Following a jury trial, Moreland was removed as sole managing conservator, and Delcourt was appointed sole managing conservator.

In March 1990, Moreland moved to modify custody based on allegations that Tiffany's "present environment may endanger her physical health or significantly impair her emotional development". The trial court held a hearing and issued temporary orders removing Delcourt as the sole managing conservator and appointing Moreland temporary managing conservator. Delcourt, though served with notice, did not appear at the hearing. In the same order, the trial court appointed Dr. Edward Silverman, Ph.D., a psychologist, to evaluate Tiffany, Delcourt, and Moreland. The order required Silverman to interview and evaluate the parties, and file a written report with the trial court. A few days later, the trial court appointed Norma Levine Trusch as guardian ad litem.

In October 1990, a jury trial was held to determine the custody issue. The jury found Delcourt should be removed as sole managing conservator and Moreland should be appointed. The trial court entered an order based on the jury's verdict.

On October 1, 1992, Delcourt filed the present suit against Silverman and Trusch. Delcourt filed several amended petitions alleging numerous causes of action. Silverman and Trusch filed motions for summary judgment arguing that as a matter of law: (1) they owed no duty to Delcourt; and (2) they were protected by judicial immunity for actions taken within the scope of their appointments. The trial court

granted the motions for summary judgment.

II. Standard of Review

Summary judgment for a defendant is proper where the summary judgment evidence negates an essential element of the plaintiff's cause of action as a matter of law or establishes all elements of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). The Texas Supreme Court has clearly articulated the appropriate standards to be used when reviewing summary judgments:

1. the movant for summary judgment has the burden of showing that there is a no genuine issue of material fact and that it is entitled to summary judgment as a matter of law;

2. in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and

3. every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co.. 690 S.W.2d 546, 548-49 (Tex. 1985); *Karl v. Oaks Minor Emergency Clinic*, 826 S.W.2d 791, 794 (Tex.App.--Houston [14th Dist.] 1992, writ denied).

When an order granting summary judgment does not specify the grounds upon which it is granted, as in the present case, the judgment will be

affirmed on appeal if any of the grounds raised in the motion are meritorious. *See Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex. 1989). The two grounds for summary judgment urged by Silverman and Trusch were: (1) no duty; and (2) judicial immunity. Delcourt has contested the summary judgments both substantively and procedurally. We will first address the procedural issues, then consider appellees' affirmative defense of judicial immunity.

III. Discussion

A. Procedural Issues

In her first point of error, Delcourt claims the trial court erred in granting the summary judgments for Silverman and Trusch because their motions for summary judgment failed to address all the causes of action alleged by Delcourt in her Third Amended Original Petition. Delcourt's claim is apparently based on the fact that Silverman and Trusch filed their motions before Delcourt filed her Third Amended Original Petition. Although there is some dispute in this case as to whether the Second or Third Amended Original Petition was the live pleading at the time of the hearing on the motions for summary judgment, it is immaterial because the same causes of action are raised in both petitions: (1) negligence; (2) fraud; (3) civil conspiracy; and (4) intentional infliction of severe mental distress.

In her brief, Delcourt argues that her Third Amended Original Petition alleged claims for: (1) breach of common law duty; (2) breach of court appointed duty; (3) negligence; (4) fraud; (5) violations of her constitutional and parental rights; (6) civil conspiracy; (7) tortious interference with

custodial and parental rights; (8) intentional infliction of severe mental distress; and (9) failure to provide standard of care. However, we have closely reviewed Delcourt's Third Amended Original Petition and find she did not allege all causes of action she claims in her appellate brief. Nowhere does Delcourt allege "tortious interference with custodial and parental rights," even if such a cause of action was recognized in Texas. Although Delcourt does summarily state she was denied "her constitutional right to due process," she fails to articulate facts supporting such a claim. Further, several of the causes of action that Delcourt claims she alleged are not specifically recognized in Texas and are merely permutations of ordinary negligence, e.g. breach of common-law duty, breach of court-appointed duty, and failure to provide standard of care. A careful examination of Delcourt's Third Amended Original Petition shows she pled the four legally cognizable causes of action stated above: (1) negligence; (2) fraud; (3) civil conspiracy; and (4) intentional infliction of severe mental distress.

The motions for summary judgment filed by Silverman and Trusch allege they are entitled to judgment as a matter of law because: (1) they owed no duty to Delcourt, an argument relevant to those causes of action involving an element of duty; and (2) they are entitled to judicial immunity, an argument relevant to all of the causes of action alleged by Delcourt. Thus, the motions address all causes of action alleged in the Third Amended Original Petition. Delcourt's first point of error is overruled.

In her second point of error, Delcourt argues the trial court erred in granting summary judgment in favor of Trusch because Trusch served her with a

response during the hearing on the motion for summary judgment. This response allegedly contained additional affidavits as summary judgment evidence. In view of our decision in points three through eight, discussed below, we find this point of error meritless. The summary judgment evidence attached to Trusch's amended motion for summary judgment was sufficient to entitle her to prevail, therefore, whether the responses containing the additional affidavits was untimely is immaterial. Appellant's second point of error is overruled.

B. Substantive Issues

In points of error three through five and nine, Delcourt essentially contends the trial court should not have granted summary judgment in favor of Silverman and Trusch because: (1) there was material fact issue regarding the existence of a duty; and (2) appellees were not entitled to absolute immunity. We will first address whether Silverman and Trusch were entitled to summary judgment based on their affirmative defense of absolute immunity.

1. Absolute Immunity

This case presents questions of first impression in Texas: whether a psychologist, appointed under Rule 167a(d)(1) in a case arising under Title II of the Texas Family Code, and a guardian ad litem, appointed under article 11.10 of the Texas Family Code, are entitled to absolute immunity for actions taken pursuant to their appointments.

It is well-established that judges are absolutely immune from liability for judicial acts that are not

performed in the clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive. *Johnson v. Kegans,* 870 F.2d 992, 995 (5th Cir.), *cert. denied,* 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989); *Turner v. Pruitt,* 161 Tex. 532, 342 S.W.2d 422, 423 (1961). Judges are granted this broad immunity because of the special nature of their responsibilities. *Kegans*, 870 F.2d at 995. Judicial immunity, which is firmly established at common law, protects not only the individual judges, but benefits the public "whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Bradley v. Fisher,* 80 U.S. 335, 350, 20 L.Ed. 646 (13 Wall 335)(1871)(citations omitted).

When judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. *Byrd v. Woodruff,* 891 S.W.2d 689, 707 (Tex.App.--Dallas 1994, writ denied). Officers of the court who are integral parts of the judicial process, such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees are entitled to judicial immunity if they actually function as an arm of the court. *Id. See also Babcock v. Tyler,* 884 F.2d 497 (9th Cir. 1989), *cert. denied,* 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990)(holding social worker absolutely immune). *Demoran v. Witt,* 781 F.2d 155 (9th Cir. 1985)(holding probation officers absolutely immune), *Wiggins v. New Mexico State Supreme Court Clerk,* 664 F.2d 812 (10th Cir.)(holding state supreme court justices and clerk absolutely immune), *cert. denied,* 459 U.S. 840, 103 S.Ct. 90, 75 L.Ed.2d 83 (1982); *Ashbrook v. Hoffman,* 617 F.2d 474 (7th Cir.

1980)(holding partition commissioner absolutely immune). This type of absolute immunity is referred to as "derived judicial immunity." *See Clements v. Barnes,* 834 S.W.2d 45, 46 (Tex. 1992). The policy underlying derived judicial immunity that protects participants in judicial and other adjudicatory proceedings is sound. Not only does the policy guarantee an independent, disinterested decision-making process, these immunities prevent the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion. *Kegans,* 870 F.2d at 996-97.

Courts around the country have followed the lead of the United States Supreme Court and adopted a functional approach in determining whether a party is entitled to absolute immunity. *See Gardner v. Parson,* 874 F.2d 131, 145-46 (3d Cir. 1989); *Hodorowski v. Ray,* 844 F.2d 1210, 1213-15 (5th Cir. 1988); *Meyers v. Contra Costa County Dep't of Social Serv.,* 812 F.2d 1154, 1157 (9th Cir.), *cert. denied,* 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987); *Malachowski v. City of Keene,* 787 F.2d 704, 712 (1st Cir.) *cert. denied,* 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986). Under the functional approach, courts determine whether the activities of the party seeking immunity are ultimately associated with the judicial process. *Imbler v. Pachtaman,* 424 U.S. 409, 430-31, 96 S.Ct. 984, 994-96, 47 L.Ed.2d 128 (1976). The question is whether the activities undertaken by the party are "functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtaman,* 424 U.S. at 430, 96 S.Ct. at 995. In other words, a party is entitled to absolute

immunity when the party is acting as an integral part of the judicial system or an "arm of the court". *Briscoe v. LaHue,* 460 U.S. 325, 335, 103 S.Ct. 1108, 1115, 75 L.Ed.2d 96 (1983).

We agree with those courts that have applied the functional approach to determine whether a party should be immune from suit based on derived judicial immunity. We must now determine whether, applying a functional analysis, the psychologist and the guardian ad litem in this case were entitled to summary judgment based on absolute immunity.

A. The psychologist

Silverman, a psychologist, was appointed by the court to meet with Delcourt, her ex-husband, and the minor child. Under Rule 167a(d), the court, in cases arising under Title II of the Texas Family Code, may appoint one or more psychologists to make any and all appropriate mental examinations of the child or children who are the subject of the suit or any other parties to the suit. Tex. R. Civ. P. 167a(d)(1).

Applying the functional approach, a psychologist who is appointed by the court is entitled to absolute immunity if he or she is appointed to fulfill quasi-judicial functions intimately related to the judicial process. *Myers v. Morris,* 810 F.2d 1437, 1466-67 (8th Cir.), *cert. denied,* 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *S.T.J. v. P.M.,* 556 So.2d 2144, 246 (La. Ct. App. 1990)(citing *Moses v. Parwatikar,* 813 F.2d 891 (8th Cir.), *cert. denied,* 484 U.S. 832, 108 S.Ct. 108, 98 L.Ed.2d 67 (1986). The focus is on the nature of the function performed, not the identity of the actor. *Lavit v. Superior Court of Arizona,* 839 P.2d 1141, 1144 (Ariz. Ct. App. 1992)(citing *Forrester v. White,* 484 U.S.

219, 230, 108 S.Ct. 538, 545-46, 98 L.Ed.2d 555 (1988)). The question is whether the psychologist's activity is such an integral part of the judicial process that to deny immunity would disserve the broader public interest that non-judicial officers act without fear of liability. *Lavit,* 839 P.2d at 1144.

Numerous courts have extended absolute immunity to psychiatrists and other mental health experts assisting the court in criminal cases. *See, e.g. Moses v. Parwatikar,* 813 F.2d at 892 (holding psychiatrist entitled to absolute immunity when appointed on competency examination). The consistent reasoning given by the courts in these cases is that the psychiatrist or mental health professional performed a special task closely related to the judicial process pursuant to a court directive. *Lavit,* 839 P.2d at 1145.

We believe this reasoning also applies to mental health experts appointed to provide psychological expertise in child custody suits. *Id.* Many courts recognize that psychiatrists and psychologists performing court-ordered custody evaluations perform a judicial function and enjoy absolute immunity. *See, e.g., Williams v. Rapperport,* 699 F.Supp. 501 (D. Md. 1988), *aff'd,* 879 F.2d 863 (4th Cir.), *cert. denied,* 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989); *Doe v. Hennepin County,* 623 F.Supp. 982 (D. Minn. 1985); *LaLond v. Eissner,* 539 N.E.2d 538 (Mass. 1989). When a court appoints a mental health professional to examine the child and the parents in a custody proceeding, the professional is acting as a fact finder for the court. The court relies on the professional to provide information essential to the decision-making process. Without the protection of absolute immunity, such professionals would be, at the very least, reluctant to

accept these appointments. This would in turn inhibit judges from performing their duties. Applying the functional approach to the facts of this case, we review Silverman's summary judgment proof to determine whether he proved as a matter of law that he functioned as an extension of the court. In support of his motion, Silverman attached an affidavit from Linda Motheral, who, during the relevant time period, was the Associate Judge of the 257th District Court. In the affidavit, Motheral states that she appointed Silverman to meet with the parents and the minor child. Motheral further states that Silverman was appointed to "assist in the determination of the emotional and medical issues surrounding the allegations of sexual abuse." Motheral asserts Silverman served at her request as an officer of the court to assist her in protecting the interests of the minor child.

In addition to the Motheral affidavit, Silverman attached his own affidavit stating he met with the parents and the minor child as requested and conducted an evaluation. He maintains his evaluation was conducted as an "agent" of the court, and each interview and evaluation was in accordance with the order of the court. His affidavit states that, during the trial, he testified concerning the interviews and evaluations and gave an opinion as the court-appointed mental health expert. The summary judgment evidence presented by Silverman established he was appointed by, and acted as a functionary of, the court when he took the actions that form the basis of Delcourt's claims. Thus, Silverman's summary judgment proof showed that he was entitled to absolute judicial immunity as a matter of law.

Once Silverman produced sufficient evidence

to establish his right to summary judgment, Delcourt was required to set forth contraverting evidence to raise a fact issue to avoid the summary judgment. *See Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 460 (Tex. App.--Houston [1st Dist.] 1994, writ denied)(citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-937 (Tex. 1972)). However, the responses filed by Delcourt present no summary judgment evidence to defeat Silverman's affirmative defense of derived judicial immunity. Therefore, the trial court did not err in granting summary judgment in favor of Silverman.

b. The guardian ad litem

Trusch was appointed by the court to act as guardian ad litem for Tiffany under article 11.10 of the Texas Family Code. As a court-appointed guardian ad litem, Trusch moved for summary judgment claiming absolute judicial immunity. The Dallas Court of Appeals has addressed the liability of a guardian ad litem appointed pursuant to Texas Rule of Civil Procedure 173 in the context of a minor settlement hearing. *See Byrd,* 891 S.W.2d at 704. Additionally, the Texas Supreme Court, in *Simmons v. Amim*, 110 Tex. 309, 220 S.W. 66, 71 (1920), decided that a guardian ad litem could not be held personally responsible to pay a final judgment or court costs because an ad litem is not a party to the litigation. However, the liability of a guardian ad litem appointed pursuant to section 11.10 of the Texas Family has never been addressed.[1] To determine this

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[1] At least one commentator has expressed concern over the fact that

issue, we must examine the nature of the relationship among the guardian ad litem, the minor, the parents, and in this instance, the family. *See Byrd,* 891 S.W.2d at 704.

In *Byrd,* the Dallas Court of Appeals determined the issue of immunity by focusing on the nature of the relationship between the ad litem and the minor in the context of a minor settlement hearing involving the apportionment of settlement proceeds. The appointment of a guardian ad litem in such a case is authorized only when there exists a conflict between the next friend and the minor. 891 S.W.2d at 705; See Tex. R. Civ. P. 173[2] A guardian ad litem, once appointed, displaces the next friend and becomes the personal representative of the minor. *Id.* The court compared the relationship to

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there are no Texas cases that address these issues: "As a result, it may be anticipated that there will be the potential for increasing shortages of available and qualified attorneys over the next few years who will be willing to risk this uncertainty and exposure." Jim Guiberteau and Linda Motheral, *The Changing Role of Guardian and Attorney Ad Litem,* 58 TEX. B.J. 955, 957 (1995).

[2] Rule 173 provides that when a minor is a party to a suit either as plaintiff, defendant, or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to the minor, the court must appoint a guardian ad litem for the minor. Tex. R. Civ. P. 173.

that of a guardian of a ward or the personal representative of an estate, and held that a fiduciary relationship existed between a minor and a guardian ad litem appointed under Rule 173 within the context of a friendly suit. *Id.* at 706. As a fiduciary, the ad litem is empowered to make decisions for, and act on behalf of, the minor. *Id.* at 708 (citing *Newman v. King,* 433 S.W.2d 420, 421 (Tex. 1968)); *Dawson v. Garcia,* 666 S.W.2d 254, 265 (Tex. App.--Dallas 1984, no writ); *Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida,* 596 S.W.2d 947, 951 (Tex. Civ. App.--Fort Worth 1980, no writ).

In discharging its duty under Rule 173, the guardian ad litem has a duty to conduct a thorough investigation and evaluate: (1) the damages suffered by the minor; (2) the adequacy of the settlement; (3) the proposed apportionment of the settlement proceeds among the interest parties; (4) the proposed manner of disbursement of the settlement proceeds, and (5) the amount of attorney's fees charged by the minor's attorney. *Byrd,* 891 S.W.2d at 707. The ad litem must then make a recommendation to the trial court on the minor's behalf. *Id.* These duties place the ad litem in the capacity of the minor's personal representative, displacing the next friend. Thus, the ad litem is acting as an advocate and not a representative of the court. *Id.* at 708. In that particular situation it would be unfair to deny a minor the ability to seek recourse for inadequate representation. *Id.* The court concluded, therefore, that an ad litem appointed under Rule 173 to represent a minor during settlement proceedings can be liable in a civil action for damages resulting from a breach of his duties as the minor's personal representative. *Id.*

The decision in *Byrd* is consistent with the

functional approach applied by the federal courts when analyzing a claim of judicial immunity. Under the functional approach, a guardian ad litem is absolutely immune when acting as an actual functionary or arm of the court. *Gardner,* 874 F.2d at 146. *See also Imbler v. Pachtaman,* 424 U.S. at 430-31, 96 S.Ct. 994-96; *Holorowski v. Ray,* 844 F.2d at 1213-15. All of the duties enumerated by the court in *Byrd* are performed for the minor and for the minor's interest; they are not normally performed by the appointing judge. When an ad litem is appointed under Rule 173, he or she is not acting as an "arm of the court" or performing functions the court normally performs, because trial courts do not act as advocates. *See Byrd,* 891 S.W.2d at 707. The ad litem appointed under Rule 173 is acting as a personal representative and advocate for the interests of the minor; the fact that he or she was appointed by the court is merely procedural. Therefore, this type of ad litem is not and should not be entitled to absolute immunity. *Id.*

To determine whether absolute immunity applies to a guardian ad litem appointed pursuant to section 11.10 of the Texas Family Code, we must examine the duties contemplated by the appointment. Considerations favoring immunity have generally been found in the context of disputes involving child custody or allegations of neglect or abuse of a child. For example, in *Kurzawa v. Mueller,* 732 F.2d 1456, 1458 (6th Cir. 1984), parents brought suit against their son's guardian ad litem alleging Constitutional violations arising from the alleged unlawful termination of their parental rights. The Sixth Circuit held that the guardian ad litem was entitled to absolute immunity because the ad litem must act in the best interests of the child, and "[t]his position

clearly places him squarely within the judicial process to accomplish that goal." *Id.* In *Gardner,* the Third Circuit agreed with the *Kurzawa* approach to the extent that it was based on the guardian's function rather than merely his status. *Gardner,* 874 F.2d at 145, n.21.

Relying on *Kurzawa,* other courts have reached similar results. For example, in *Cok v. Cosentino,* 876 F.2d 1 1st Cir. 1989), an ex-wife sued the guardian ad litem for her minor child in a divorce proceeding, alleging that he acted without guidelines, qualifications, duties, obligations or responsibilities and engaged in a pattern of racketeering activities. The First Circuit held that the ad litem was involved in the adjudicative process and shared in the family court judge's absolute immunity. *Id.* at 3. Similarly, in *Myers v. Morris,* 810 F.2d 1437 (8th Cir.), *cert. denied,* 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987), guardians who were appointed by a family court to investigate allegations of sexual abuse were held to be absolutely immune from suit for their oral testimony, questioning of the children, and the provision of their reports and recommendations to the family court. *Id.* at 1466-67. *See also Ward v. San Diego County Dep't of Social Servs.,* 691 F.Supp. 238, 240 (SA.D.Cal. 1988)(holding guardian ad litem was acting as extension of court when investigating facts and reporting to court what placement was in child's best interest).[3]

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[3] The majority of these opinions dealing with the issue of derived judicial immunity involve federal civil rights cases brought under 42. U.S.C. § 1983 (1988). *But see Tindell v. Togosheske,* 421

The considerations favoring immunity in the child custody or abuse setting are numerous and compelling. First, the guardian ad litem must be able to make impartial recommendations to the court. This ability may be impeded in child custody cases because:

> [o]ften, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict. To safeguard the best interests of the children, however, the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents.

Short v. Short, 730 F.Supp. 1037, 1039 (D. Colo. 1990). Thus, the threat of liability could distort the ad litem's investigative role and substantially impede his

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N.W.2d 340, 341 (Minn. Ct. App.), *aff'd* 428 N.W.2d 386 (Minn. 1988)(holding guardian ad litem absolutely immune from negligence claim). Though the law relating to derived judicial immunity developed substantially in the civil rights context, we see no reason to limit the basic principles applicable in those cases. *See Collins v. Tabet,* 806 P.2d 40, 47 (N.M. 1991).

or her ability to ascertain and report to the court the best placement for the child. In turn, "the ability of the judge to perform his or her judicial duties would be impaired and the ascertainment of truth obstructed." *Ward,* 691 F. Supp. at 240.

Second, the availability of qualified attorneys to represent children in the midst of a custody dispute might be affected if disgruntled or vituperative parents could hold the guardian ad litem personally liable. *Collins v. Tabet,* 806 P.2d 40, 51 (N.M. 1991), *see also* Jim Guiberteau and Linda Motheral, *The Changing Role of Guardian and Attorney Ad Litems,* 58 Tex. B.J. 955, 957 (1995). Finally, the source and extent of the guardian ad litem's compensation may be considered in determining whether the ad litem is functioning as an advocate or an arm of the court. For example, when a guardian ad litem is compensated from the ward's resources, "there is more reason to hold that the guardian is functioning in a capacity similar to that of a private attorney than there is in cases when he or she is compensated by, for example, both parents in a custody dispute... or from public funds...." *Collins,* 806 P.2d at 51 n.7. Section 11.10(d) of the Texas Family Code provides that the ad litem fee is to be paid by the parents unless they are indigent, in which case the fee will be paid from the general funds of the county where the suit is heard.

Based upon our review of the available case law, we hold that a guardian ad litem appointed under article 11.10 of the Texas Family Code is absolutely immune from liability for his or her actions taken pursuant to and within the scope of their appointment, provided that the appointment contemplates the ad litem acting as an extension of the court.

To be entitled to summary judgment in this case, Trusch had to prove as a matter of law that: (1)

the appointment contemplated she act as an extension or arm of the court; and (2) she did not depart from the scope of the appointment. First, we will look at the summary judgment proof relating to the nature of Trusch's appointment. Attached to her motion for summary judgment is an affidavit by Associate Judge Linda Motheral. In the affidavit, Motheral states that she appointed Trusch to serve as guardian ad litem. She further states that as guardian ad litem, "it would be within the scope of Ms. Trusch's duties to meet with both of the parties to the custody suit to gather information from professionals, lay witnesses and police officers regarding Ms. Delcourt's allegations of sexual abuse." Finally, Motheral states that Trusch served at Motheral's request "as an officer of the Court to assist me in properly protecting the minor child's interest." Thus, the summary judgment evidence shows Trusch's appointment contemplated that she would function on behalf of the court.

Trusch also attached her own affidavit to her motion for summary judgment. In the affidavit, Trusch states that she was appointed "to assist the court in its determination of the emotional and legal issues surrounding the allegations of sexual abuse and their affect on the minor child, Tiffany." Trusch also states that in carrying out her duties she was acting as an agent of the court. The other paragraphs in the affidavit indicate that Trusch acted within the scope of her appointment and did not depart from her role as a functionary of the court.

The summary judgment evidence presented by Trusch was sufficient to establish the affirmative defense of derived judicial immunity. When a defendant produces sufficient evidence to establish the right to summary judgment, the plaintiff must set forth sufficient evidence to give rise to a fact issue to avoid

summary judgment. *E.G., Louisiana Natural Gas Pipeline,* 875 S.W.2d at 460 (citing *"Moore" Burger,* 492 S.W.2d at 936-37). Once Trusch presented sufficient summary judgment evidence to establish her affirmative defense of absolute immunity, the burden shifted to Delcourt to provide contraverting evidence. However, Delcourt presented no summary judgment evidence contraverting either (1) the scope of Trusch's appointment, or (2) Trusch's evidence that she acted within the scope of that appointment. The gravamen of Delcourt's complaint is dissatisfaction with the manner in which Silverman and Trusch performed their duties. Delcourt presented no evidence that any of their actions were outside the scope of their appointments. Thus, the trial court did not err in granting summary judgment in favor of Trusch.

We overrule points of error three through five and nine.

2. Affidavits

In point of error six, appellant claims the trial court erred in granting summary judgment in favor of Silverman and Trusch because their affidavits did not "properly set forth a standard of care, were conclusions and opinions and are not competent summary judgment evidence."

If Silverman and Trusch had moved for summary judgment on the ground that they had complied with the applicable standard of care for court-appointed psychiatrists and guardians ad litems, respectively, then it is true, as Delcourt contends, that they would be required to articulate the applicable standard of care and demonstrate their compliance therewith. *See, e.g., Cohn v. Winters,* 646 S.W.2d 655, 657 (Tex. App.–Fort Worth 1983, writ ref'd n.r.e.). However, Silverman and Trusch did not move for

summary judgment on that basis. Rather, they claimed that they had *no duty* to Delcourt as a matter of law and that, in any event, they were entitled to absolute immunity. Therefore whether or not their affidavits set forth a standard of care is immaterial.

Moreover, we have reviewed the affidavits presented by Silverman and Trusch and find they are not conclusory. The affidavits set forth factual allegations concerning the events in question as they relate to the no duty and absolute immunity issues. We hold the affidavits were competent summary judgment evidence. Appellant's sixth point of error is overruled.

3. Constitutional Violations, Conspiracy and Absolute Immunity

In her seventh point of error, appellant claims the trial court erred in granting summary judgment because absolute immunity cannot protect a defendant from claims of constitutional violations or conspiracy. Citing *Duncan v. Peck,* 844 F.2d 1261 (6th Cir. 1988),[4]

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[4] We note that many courts have specifically criticized and/or declined to follow the *Duncan* case. *See, e.g., Rodriquez v. Furtado,* 950 F2d 805, 814 (1st Cir. 1991); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 787 F.Supp. 471 (E.D. Pa. 1992), *aff'd in part, vacated in part,* 20 F.3d 1250 (3d Cir. 1994); *Shipley v. First Federal Sav. & Loan Ass'n of Delaware,* 703 F.Supp. 1122, 1132 (D. Del. 1988), *aff'd,* 877 F.2d 57 (3d Cir. 1989), *cert. denied,* 496 U.S. 938, 110 S.Ct. 3218, 100 L.Ed.2d 6766 (1990).

appellant argues there is no immunity for alleged constitutional claims when private parties, such as Silverman and Trusch, conspire with an official to deprive a person of constitutional rights. We disagree.

We have already determined that appellant did not raise any constitutional claims. Moreover, we do not believe that a conspiracy claim should defeat the affirmative defense raised by Silverman and Trusch based upon derived judicial immunity. In *Moses v. Parwatikar,* the Eighth Circuit rejected Delcourt's argument, emphasizing that exceptions to absolute immunity should not be freely created. 813 F.2d at 893. The court held:

> To defeat this doctrine [absolute immunity] by pleading a conspiracy would be to create an exception where none was intended. Clearly a judge who conspires to violate a person's constitutional rights acts maliciously or corruptly. However, the need to preserve the judge's independence requires a grant of absolute immunity. The same policy requires us to hold a court appointed psychiatrist immune. Even if Dr. Parwatikar conspired to find Moses competent to stand trial, this suit for damages should be barred because conspiracy is nothing more than a specific act of corruption.

Id.

Other federal courts have also ruled that a claim of conspiracy does not defeat absolute immunity. *See, e.g. Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986); *Dukes v. Hosemann,* 776 F.2d 942, 946 (11th Cir. 1985), *cert. denied,* 479 U.S. 983, 107 S.Ct. 569,

93 L.Ed.2d 574 (1986); *Holloway v. Walker,* 765 F.2d 517, 523 (5th Cir.), *cert. denied,* 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985). Appellant's seventh point of error is overruled.

4. The appointments

In point of error eight, appellant contends the trial court should have granted her motion for new trial because "there were no court orders rendered or signed by Judge Lee appointing either one of the Appellees." Essentially appellant complains that, because there are not written orders in the record showing Silverman and Trusch were in fact appointed, a material fact issue exists. We disagree. Though no written orders were presented by Silverman or Trusch showing they were appointed, both included their own affidavits and an affidavit from Linda Motheral stating they were appointed. These affidavits were uncontested by Delcourt in her response to the motions for summary judgment. In addition, the order signed by Judge Robertson on October 19, 1990, on the motion to modify in the suit affecting the parent-child relationship, which was part of the summary judgment proof, acknowledges the appointments of, and services performed by, Silverman and Trusch. We find the summary judgment evidence sufficient to prove as a matter of law that Silverman and Trusch were appointed by the court. Appellant's eighth point of error is overruled.

IV. Conclusion

The trial court correctly granted summary judgment in favor of Silverman and Trusch because they proved each essential element of their affirmative

defense of absolute immunity as a matter of law. Because we find Silverman and Trusch were entitled to summary judgment based on immunity, we do not reach the issue of no duty that was presented as an alternative ground for summary judgment.
The judgment of the trial court is affirmed.

/s/ Harriet O'Neill
Justice

Judgment rendered and Opinion filed March 7, 1996.

Panel consists of Justices Yates, Fowler and O'Neill.

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